

As part of the location agreement, respondent provided company vehicles to provide travel between Lawrence, where the workers were housed, and Ottawa, at the job site. Claimant testified, and his testimony is un rebutted, that the use of these vehicles was mandatory. Claimant also testified that drivers had been hired to drive the vehicles. Claimant himself did not drive the company vehicles between Lawrence and Ottawa.

On April 21, 2001, claimant appeared at the pick up location at approximately 5:00 in the morning. Only one company vehicle arrived that day, and it was completely full. Claimant testified that three of the four company vehicles were unavailable. One of the vehicles was out of service and scheduled to be towed for repair, another had hit a deer the day before, and the third was unavailable due to the fact that the driver was either off work that day or had something else to do and could not go to work on that day.

With only one company vehicle available, and it being completely full, claimant was forced to ride with a co-employee named David Verber. Claimant had no other means of transportation between Lawrence and Ottawa on that date. He testified that, in order to protect his job, he needed to be in Ottawa, performing his job duties for respondent.

Claimant then climbed into the car with Mr. Verber, and they left Lawrence, heading towards Ottawa. At some time during the trip, Mr. Verber's vehicle crossed the center line and they were involved in a head-on collision, resulting in serious injuries to claimant's hip, spleen, ribs, lungs and head. Claimant is seeking medical treatment and temporary total disability benefits as a result of that accident. It is acknowledged in the record that claimant was not wearing his seatbelt while traveling with Mr. Verber. Claimant testified he normally wore his seatbelt while in the company vehicles. He does not know why he was not wearing his seatbelt on that day. He speculated that he forgot due to the confusion of having to switch vehicles. Again, claimant's testimony is uncontradicted.

In workers compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g). The Board will first consider respondent's contention that claimant should be denied benefits for having failed to use his seatbelt. K.S.A. 44-501(d)(1) states:

If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

K.S.A. 44-501(d) requires that a claimant's act be "willful". Willful, for purposes of K.S.A. 44-501(d), has been defined as including "the element of intractableness, the headstrong disposition to act by the rule of contradiction." Bersch v. Morris & Co., 106 Kan. 800, 804, 189 Pac. 932 (1920).

The modern rule is that violation of a statute is not wilful misconduct *per se*. There must be the intentional doing of something of a quasi-criminal nature, either with knowledge that it is likely to result in serious injury, or with

a wanton disregard of probable consequences. 2 Larson's Workers' Compensation Law, § 37.03, p. 37-6 (2000).

The great majority of cases involving simple violation of traffic ordinances and statutes, such as speed or stop laws, have failed to find wilful misconduct on the strength of the violation. 2 Larson's Workers' Compensation Law, § 37.03, p. 37-7 (2000).

The violation alone of instructions from an employer is not enough to render the employee's actions "willful" as a matter of law under K.S.A. 44-501(d). Hoover v. Ehram Co., 218 Kan. 662, 544 P.2d 1366 (1976).

In this instance, claimant testified that he normally wore his seatbelt while traveling in the company vehicles, but forgot in the confusion of swapping vehicles and riding with a co-employee. The Appeals Board does not find claimant's actions in this regard to be willful. The opinion by the Administrative Law Judge finding claimant's actions not willful is, therefore, affirmed by the Appeals Board.

K.S.A. 44-501(a) states in part:

If any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employment, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.

K.S.A. 44-508(f) states in part:

The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence.

Generally, when a journey to or from work is made in an employer's conveyance, the journey is in the course of employment with the reason being that the risk of the employment continues throughout the journey. 1 Larson's Workers' Compensation Law, Chapter. 15, p. 15-1 (2000).

The reason for the rule in this section depends upon the extension of risks under the employer's control. 1 Larson's Workers' Compensation Law, § 15.01[1], p. 15-2 (2000).

If there is nothing more in the facts than the bare availability of transportation in the employer's conveyance, which privilege the employee forgoes in favor of using his or her own car, motorcycle, or bicycle, compensation has been denied. 1 Larson's Workers' Compensation Law, § 15.01[3], p. 15-2 to 15-3 (2000).

If the trip to and from work is made in a truck, bus, van, car, or other vehicle under the control of the employer, an injury during that trip is incurred in the course of employment. 1 Larson's Workers' Compensation Law, § 15.01, p. 15-2 (2000).

In this instance, however, there is a distinction between the rule set forth and the facts. An employer's conveyance was provided which claimant, by his own uncontradicted testimony, was obligated to utilize. The only reason on the date of accident claimant was in a private vehicle was due to the unavailability of the employer-provided conveyances.

In Kansas, when an employer provides transportation, it has generally been held compensable. In Blair v. Shaw, 171 Kan. 524, 233 P.2d 731, *reh'g denied* (1951), the Kansas Supreme Court held compensation was payable because it had become an employment custom for mechanics to travel by private vehicle to another city in order to take an annual technical examination. The Court held that the employees had not left their employment while traveling to and from the examination site.

Likewise, in Hanson v. Zollars, 189 Kan. 699, 371 P.2d 357, *reh'g denied* (1962), the injured worker on many occasions rode in the company vehicle, driven by his foreman, with the knowledge and consent of the company. When a worker was injured during travel to a different job, the injury was found to be compensable.

In this instance, the claimant's travel with the co-employee was necessitated by the unavailability of the employer-provided conveyances. It normally was claimant's obligation as part of his employment to ride in the respondent-provided transportation.

In a clear case of employer compensation for the travel expenses, the fact that the employee adopts some substitute for the usual method of making the journey does not alter the fact that the journey remains part of the service compensated for. 1 Larson's Workers' Compensation Law, § 15.01[3], p. 15-2 to 15-3 (2000).

In this instance, the Appeals Board finds that the transportation to work would be considered a part of the compensation to claimant. Claimant did not have a private vehicle in Kansas and did not possess a valid driver's license at the time of the accident. It was clear from the testimony that claimant was required to travel in the employer-provided conveyances until the conveyances suddenly became unavailable due to, for the most part, mechanical difficulties. The Appeals Board, therefore, finds that claimant's injury on

April 21, 2001, did arise out of and in the course of his employment and the Administrative Law Judge's Order of August 23, 2001, should be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Brad E. Avery, dated August 23, 2001, should be, and is hereby, affirmed with regard to whether claimant violated a safety rule under K.S.A. 44-501, but is reversed with regard to whether claimant suffered accidental injury arising out of and in the course of his employment and remanded for further order consistent with the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of October, 2001.

BOARD MEMBER

c: Michael J. Unrein, Attorney for Claimant
James K. Blickhan, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director